



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

**JOHN E. HILL,
ATTORNEY GENERAL**

February 18, 1976

The Honorable Thomas S. Bishop
Adjutant General
P. O. Box 5218
Austin, Texas 78763

Opinion No. H-782

Re: Whether the Federal
Privacy Act of 1974 applies
to the Texas National Guard.

Dear General Bishop:

You have requested our opinion regarding whether the Federal Privacy Act of 1974, 5 U.S.C. § 552a, is applicable to the Texas National Guard while in State status and to the Army and Air Technician Program.

The purpose of the Federal Privacy Act is

to provide certain safeguards for an individual against an invasion of privacy by requiring Federal agencies, except as otherwise provided by law, to [perform certain duties]. P.L. 93-579, § 2(b), U.S. Code C&A News, Vol.2 (1974) at 2178. (Emphasis added).

"Agency" means "agency as defined in section 552(e) of this title." 5 U.S.C. § 552a(a)(1). Section 552(e) defines "agency" to include

any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the executive office of the President), or any independent regulatory agency.
5 U.S.C. § 552(e).

Although no statute or judicial decision declares whether the National Guard is included within the definition of "agency," the Supreme Court has held that a member of the National Guard is not a federal employee for purposes of the Federal Tort Claims Act. In Maryland v. United States, 381 U.S. 41 (1965), the Court ruled that the appointment of members of the Guard

by State authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held. 381 U.S. at 48.

See also Storer Broadcasting Co. v. United States, 251 F.2d 268, 269 (5th Cir. 1958), cert.den., 356 U.S. 951 (1958). In our opinion, the status of members of a National Guard as state employees requires the conclusion that the Texas National Guard, while in state status, is a state rather than a federal agency, and that, as a result, the Federal Privacy Act is not at such time applicable thereto. See also Mela v. Callaway, 378 F.Supp. 25, 28 (S.D.N.Y. 1974); Open Records Decision No. 115 (1975).

We are supported in this view by the provisions of 32 U.S.C. § 709, which specifically designates persons in the Army and Air Technicians Program as federal employees:

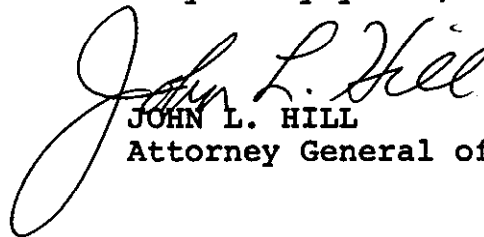
A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard. 32 U.S.C. § 709(d).

Thus, as to the Army and Air Technician Program, whose members are classified as federal employees, it is our opinion that the Federal Privacy Act is applicable. As to the remainder of the Texas National Guard, however, we believe that the Federal Privacy Act has no application.

S U M M A R Y

The Federal Privacy Act of 1974 applies to the Army and Air Technician Program but not in general to the Texas National Guard while in State status.

Very truly yours,



JOHN L. HILL

Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee

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